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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 871

PROGRESS DEVELOPMENT CORPORATION,
Petitioner,

vs.

DEERFIELD PARK DISTRICT,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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INDEX.

	PAGE
Opinion Below	1
Jurisdiction	2
Question Presented	2
Constitutional and Statutory Provisions	2
Statement	2
What Happened in Deerfield Up to November 11, 1959	5
What Happened in Deerfield After November 11, 1959	8
Progress Development Corporation's "Controlled Occupancy Pattern"	10
Summary of Argument	13
Reasons for Denying the Writ	14
A. The Decision of the Trial Court Was Based Solely on a Question of Fact	14
B. Under the Separation of Powers, the Power of the Judicial Branch to Proceed in This Case Has Been Exhausted	18
C. The State Courts Decided This Case in Accordance With Applicable Decisions of This Court	20
1. The Motives of the Body Exercising Legislative Discretion Cannot Be Inquired Into by the Judiciary	20
2. Public Use and Necessity Are Not Affected by the Landowner's Proposed Use of the Property	24
3. The Landowner Is Not Seeking Equal Protection—It Is Seeking a Preferred Status	25
Conclusion	31
Appendix	A-1

TABLE OF CASES.

Barry v. Legler, 39 F. (2d) 297 ..... 14, 15
City of Chicago v. R. Zwick Co., Ill. Sup. Ct. Docket Nos. 37652 and 37653 23
Detroit United Railway v. City of Detroit, 255 U. S. 171 21
Fletcher v. Peck, 6 Cranch 87 ..... 20, 21, 23
Georgia v. City of Chattanooga, 264 U. S. 472 18
Gomillion v. Lightfoot, 364 U. S. 339 24
Henderson v. United States, 339 U. S. 816 28
Hughes v. Superior Court, 339 U. S. 460 28
Joslin Mfg. Co. v. City of Providence, 262 U. S. 668 19
Kohl v. United States, 91 U. S. 367 ..... 18, 25
Progress Development Corporation v. Mitchell, 182 F. Supp. 681 ..... 1, 4, 16
Progress Development Corporation v. Mitchell, 286 F. 2d 222 ..... 1, 11, 16, 17, 27
Rindge Co. v. Los Angeles County, 262 U. S. 700 ..... 19, 20
Rohlfing v. Cat's Paw Rubber Co. (U. S. D. C. N. D. Ill. E. D., 1954), 17 F. R. D. 426 14
Soon Hing v. Crowley, 113 U. S. 703 ..... 21, 22
Taylor v. Leonard, 103 A. 2d 632 (N. J., 1954) 29
Trustees of Schools v. Sherman Heights Corp., 20 Ill. 2d 357, 169 N. E. 2d 800 3
United States v. Lynah, 188 U. S. 445 19
United States v. Yellow Cab Co., 338 U. S. 338 ..... 14, 15

MISCELLANEOUS.

Ch. 105, Sec. 8-1, Ill. Revised Stats., 1961 2
President John F. Kennedy, March 9, 1961 4
Wall Street Journal, August 13, 1962 12

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To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

OPINION BELOW.

The opinion of the learned trial judge is not appended to the Petition, as required by Rule 23.1.(i). This opinion was affirmed, without change, by the Illinois Supreme Court. It is essential to an understanding of the issues of this case. It is reproduced in the Appendix hereto at pp. A-1 to A-37.

The attention of the Court is likewise directed to *Progress Development Corporation* v. *Mitchell*, 182 F. Supp. 681, and *Progress Development Corporation* v. *Mitchell*, 286 F. 2d 222, where the same conspiracy issue was heard.

JURISDICTION.

No constitutional question is involved. Illinois Courts decided a question of fact.

QUESTION PRESENTED.

Did the Illinois Courts correctly hold that there is no evidence that any member of the Park Board formed or engaged in any conspiracy to deprive Progress Development Corporation of any of its legal rights, and that no violation of the Fourteenth Amendment to the Constitution of the United States is involved?

CONSTITUTIONAL AND STATUTORY PROVISIONS.

There is no constitutional or statutory provision involved.

No claim is made that the Eminent Domain Act of Illinois is unconstitutional. The charge of conspiracy was a question of fact.

STATEMENT.

The issues in any case are circumscribed by the pleadings. Progress Development Corporation presented two defenses involving *only* questions of fact; first, that there was no public need for acquisition of the property for public use; second, that the Park Board Members conspired to deprive Progress Development Corporation of its property. (R. 3-5.)

The Deerfield Park District, a municipal corporate body,[1] filed a petition to acquire two parcels of land owned either outright or beneficially, as a beneficiary under a trust, by Progress Development Corporation, an Illinois for

1. Ch. 105, Sec. 8-1, Ill. Revised Stats., 1961.

profit corporation, alleging the need of the land for park purposes. (R. 1-3.) In Illinois a hearing on the property of the taking is required only if a traverse (motion to dismiss) is filed by defendant and the issues are limited to those raised in the traverse.[2] Progress Development Corporation filed a traverse raising two issues: (1) is there a bona fide public need for acquisition of the property for public use, and (2) did the Park Board members conspire with others to deprive Progress Development Corporation of its rights? (R. 3-5.)

The Court held a full hearing, opening the evidence door "to its widest point" for Progress Development Corporation to introduce all evidence "bearing even a tinge of materiality". (R. 249, 250, 252.) The two properties involved herein were the last two available vacant properties in the entire western one-third of the district and had been inspected and selected as sites to be acquired in the future before Progress Development Corporation was heard of. The need and prospective use of these parcels for public purposes was conclusively proved and, in fact, conceded. (R. 115-120, 125, 126, 260, 264, 265, 286.)

From the time the expert park planner had advised the Park Board to acquire these two parcels together with other parcels throughout the district in May, 1959, the Park Board was attempting to secure the approval of the voters to a program of acquiring those park sites recommended by the planner for which the voters would approve funds to purchase. The trial court properly held that the Park Board had called the election in December, 1959 to acquire 6 sites in furtherance of the program originated in the spring of 1959 to provide the Park District with adequate park sites. (R. 119, 120, 156, 157, 278, 286.)

The trial court, in an opinion prepared with obvious

2. *Trustees of Schools* v. *Sherman Heights Corp.*, 20 Ill. 2d 357, 169 N. E. 2d 800.

care, carefully analyzing the evidence and showing the reasons for the findings, held that the evidence showed no proof of a conspiracy of the Park Board members to deprive Progress Development Corporation of its rights. (R. 286.) In fact, the evidence clearly showed that none of the Park Board members had any animosity towards Negroes or integration. (R. 235, 278-279.)

The sole purpose of the condemnation was to acquire for needed park purposes the only two available vacant pieces of property in the entire western one-third of the Park District which would be lost for future park development if acquisition action was delayed. (R. 116, 278.)[3]

The Statement appearing in the Petition at pages 2 through 14 is patterned after the novel cited as an authority at page 14. The Statement is a highly biased presentation, freely drawing from, and perverting evidence in another case, *Progress Development Corporation* v. *Mitchell*, 182 F. Supp. 681, where village officials and numerous individual citizens, not parties to this case, testified. It draws unwarranted conclusions and makes statements of fact completely unwarranted by that testimony or any testimony in this case.

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3. "Land is the most precious resource in the metropolitan area. The present patterns of haphazard suburban development are contributing to a tragic waste in the use of a vital resource now being consumed at an alarming rate.

"Open space must be reserved to provide parks and recreation, conserve water and nother natural resources, prevent building in undesirable locations, prevent erosion and floods, and avoid the wasteful extension of public services." President John F. Kennedy, March 9, 1961.

What Happened in Deerfield Up to November 11, 1959.

The very title of this section of the Petition, appearing at page 3, demonstrates the fundamental approach being made. The inquiry is *not* as to the action of the Park Commissioners. A recitation of meetings of the Board of Trustees, the Deerfield Planning Commission, and members of the school district are detailed and the state of affairs in Deerfield is described as a quiet, normal community.

Nothing is stated about the activities of the Park Commissioners. The proofs in this case show that the Park Commissioners, prior to the time that Progress Development Corporation owned any property, were much concerned because the Deerfield Park District had 47 acres of park land, and in order to properly carry out its functions, it should have 250 acres. (R. 113.)

In the spring of 1959 a professional park planner was employed to make a survey of the entire park district to determine what land was suitable and available for park purposes. In the course of this survey he inspected and walked upon both the properties in this proceeding. Two of the Park Board members likewise inspected these sites at that time. Pursuant to the employment, a report was made to the Park Board in which he specifically recommended the acquiring of the two sites now involved. (R. 112-116, 118, 184, 198.)

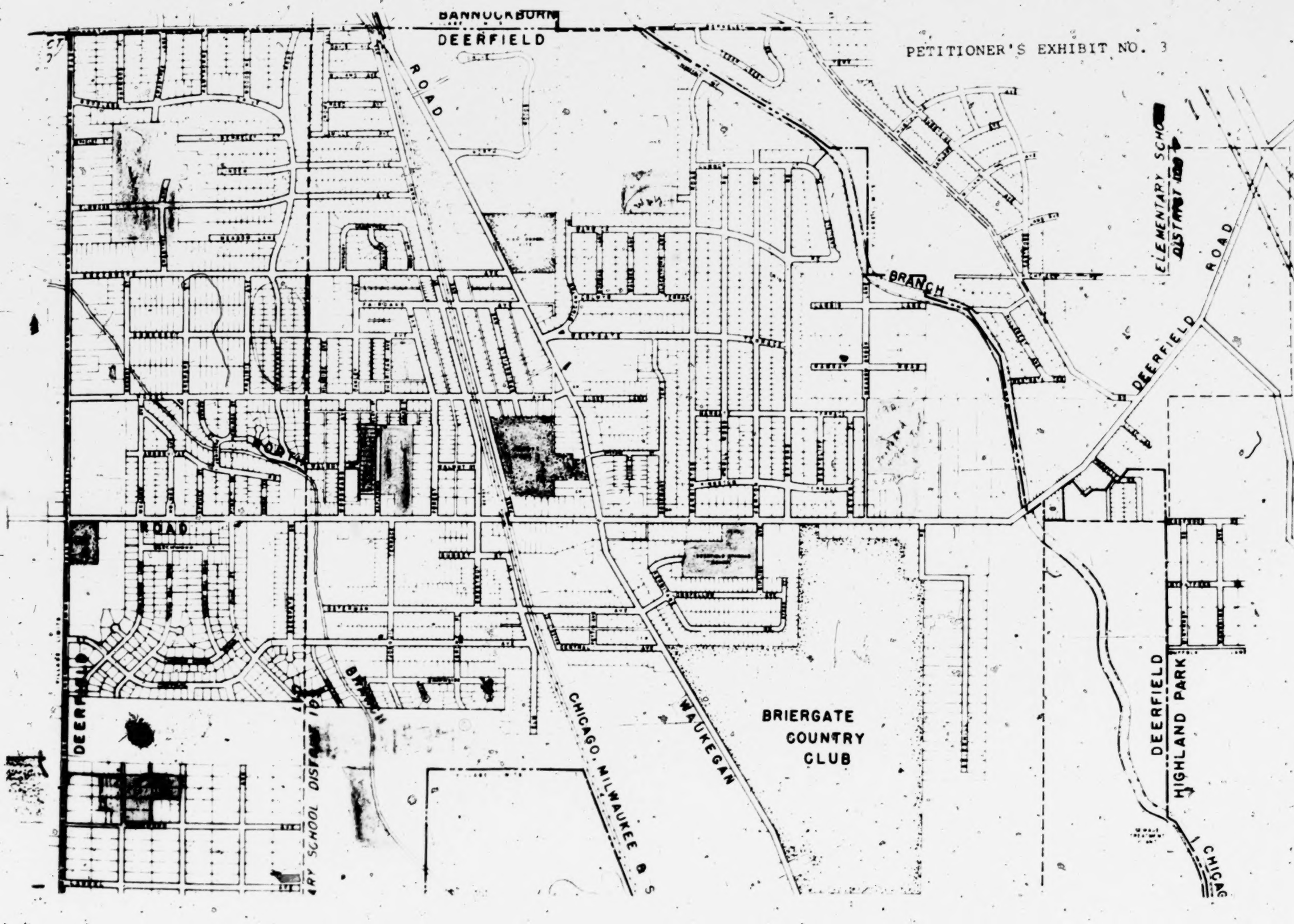
At a meeting of the Park Board in May 1959 some two months prior to the time Progress Development Corporation acquired any real estate in Deerfield, this park planner presented a map indicating property in Deerfield which should be acquired for park purposes. This map was received in evidence and is reproduced on the next

page of this Brief in reduced size. The park planner placed yellow areas on the map indicating land he recommended the Park District acquire for general park purposes. He covered areas pink to indicate land then owned by the Park or School Districts. (R. 119.) The tract of land indicated by the yellow area at the extreme left of the park planner's map is land acquired some two months later by Progress Development Corporation. This was then designated "Floral Park". (Shown opposite this page.) The property this corporation acquired and designated "Pear Tree" was acquired some three months after this park planner gave the Board a written report recommending that a swimming pool site on Wilmot Road be acquired. Three months after that recommendation, Progress Development Corporation acquired that land. (R. 93, 119, 120, 125, 126.) These are the properties involved.

None of the sites recommended by the park planner were considered for purchase at that time, as funds for such purpose would have to be secured from future bond issues. (R. 121, 154, 157, 185.)

The record is clear and undisputed. Floral Park is some 15 acres, fairly level, somewhat wooded, is an excellent site to serve the population area, is located across from Wilmot School and its acquisition is necessary to provide needed park facilities. (R. 113, 114.) Likewise, the Pear Tree site will serve a much needed purpose of providing a park upon which a swimming pool can be located. There is no swimming pool in the entire Park District, which includes the entire community of Deerfield. The erection of a swimming pool is necessary if the Park District is to properly carry out its functions. (R. 115.) It is undisputed that the two sites in question are the only available vacant sites in the entire western one-third of the Park District. (R. 116.)

PETITIONER'S EXHIBIT NO. 3



In addition to the completely undisputed testimony of the professional park planner, four park commissioners testified in detail as to the proper location of the properties, the need for park development to provide better physical play area, football, baseball, apparatus, and for the general normal functions of the Park District, as well as to provide a swimming-pool. (R. 122, 123, 124.) There was no attempt made to contradict, vary or minimize any of this testimony.

The Park District's resolutions were received in evidence. (R. 238, 239, 241, 242.) These resolutions established that the Wilmot park site adjacent to the Wilmot School is not sufficient in size to serve the needs of the residents of the Park District, and will be further reduced in size by additions to be made to the Wilmot School and that the additional park land at the Wilmot Park site is imperative if an adequate park program is to be maintained, and the only vacant land of sufficient size to meet the need is the Floral Park property, and its acquisition is necessary to and required by the Park District to maintain an adequate park program in its district. The other resolution establishes the making of a survey within the Park District of land suitable for park purposes, and that Pear Tree is desirable as a park site to be used as a swimming pool site, and its acquisition is necessary to and required for the building and maintaining of a proper system of parks in the district.

Progress Development Corporation did not contest this evidence. Although it had denied the necessity in the traverse filed, when faced with the proofs which established the *fact*, it then conceded in the Trial Court that the two properties were needed and would be used for public purposes. (R. 260, 264, 265.) In the Petition for a Writ of Certiorari filed before this Honorable Court, at page 18, Progress Development Corporation again states that after

need and suitability for parks was demonstrated, the fact was conceded.

What Happened in Deerfield After November 11, 1959.

Again, Progress Development Corporation recites in great detail actions and statements of Deerfield citizens, the Village Board of Trustees, and others, interspersing in the recitation references to Park Board members. No Park Board member attended any of the meetings at the village hall and the American Legion Hall, which are so critically described. The opinion of the Trial Court fully considers the actions of the Park Commissioners. It defines the proofs needed to establish conspiracy and then states:

> "Judged by these standards it is immediately apparent that Progress has offered no evidence whatever which directly or indirectly involves three of the members of the Park Board in the claimed conspiracy. As shown by their testimony in the Federal Court proceedings (admitted by stipulation here) commissioners Dewey and Petersen did not attend any of the meetings or participate in any way in any of the activities which Progress now questions. The only evidence as to the other commissioner in this group, Keller, is that he wrote a letter to a Deerfield paper which was published on November 26, 1959, objecting to the manner in which Progress was attempting to 'foist' its ideas upon the Deerfield community and again stated these same views at two public meetings which he attended. If the mere expression of common views is enough to constitute one a member of a conspiracy without some further evidence of participation in a common unlawful design then no member of the public would be safe in expressing his opinion on any controversial subject. The Supreme Court of Illinois in its opinion in the appeal taken in this case made this comment on this type of evidence at pages 138 and 139: 'We think it of no importance that the citizens of Deerfield and even a member of the Park District Board were opposed to

the policy of controlled occupancy adopted by Progress.' (22 Ill. (2d) 132.) Apparently Progress itself did not attach any particular significance to these statements because these activities of Keller were not even mentioned in the summary furnished by it.

"Progress had singled out only two members of the Park Board who are particularly charged with furthering the alleged conspiracy, the Board president Mitchell and the member Walchli. The principal conspirational activities charged against these two are—

1. They participated in private meetings of the Residents Association at the home of John Jursich on December 3rd and 7th, 1959.

2. They participated in a private meeting at Joseph Powell's home on December 6th, 1959, at which time they received from Powell the report of the Citizens Committee.

3. They voted for the condemnation of Progress' properties at the Park Board meeting on December 7, 1959, and thereafter caused the present suit to be filed.

"The meeting of December 3, 1959, can be quickly disposed of—Mitchell's only participation in this meeting was to tell Harold Lewis of the Citizens Committee (in response to a question by Lewis as to the Park Board's plan for a referendum) that 'it was none of his business.' There is no evidence that Walchli even attended this meeting.

"The conspirational act relied on at the meeting of December 6, 1959, at the Powell home was the receipt by these two Park Board Commissioners from Powell of the Citizens Committee report, which is termed by Progress as a 'colorable device' to justify the later condemnation. The Park Board had received other reports from this same Citizens Committee. This report represented approximately a year's work most of which antedated the Progress controversy. The document bears the innocuous title, 'The Growing Village of Deerfield,' contains only general recommendations, and is totally undeserving of any role in an alleged conspiracy.

"The informal meeting of December 7th at the Jursich home took place *after* the Park Board had already adopted resolutions providing for the acquisition of Progress' two properties, and the submission of the referendum to the voters of Deerfield in the amount of $550,000 to provide funds for the purchase or acquisition of a total of six park sites including Floral Park and Pear Tree. At this meeting Mitchell and Walchli admittedly discussed the proposed referendum, and sought the aid of the persons present in supporting the referendum including Lewis, the vocal president of the Residents Association.

"These are the only specific charges made against the members of the Park Board, and it is on this tenuous evidence that Progress bases its claim that the 'sole and exclusive purpose of this condemnation' is to prevent it from carrying on its lawful business." (R. 262-264.)

What is attempted is simply this, Progress Development Corporation, whose property is subject to the right of eminent domain, challenges the *motives* of the Park Board Commissioners in condemning the property. Admittedly the land is needed and will serve a public purpose. Nevertheless, Progress Development Corporation says that by reason of these alleged improper "motives," the right of eminent domain is lost. Also, the fact is disregarded that before Progress Development Corporation had ever been heard of, this very land was chosen as needed Park property.

Progress Development Corporation's "Controlled Occupancy Pattern".

The attorneys for Progress Development Corporation have carefully avoided any reference to its discriminatory quota system, euphonically entitled, "Controlled Occupancy Pattern." This *quota* system, not sales to negroes, was the focal point of the opposition to Progress Develop-

ment Corporation in Deerfield. Under the quota system, only a limited number of homes could be sold to negroes, and a limited number could be sold to white persons. This race discrimination was leveled at both negroes and whites. (R. 106, 176, 179, 274-276.)

This plan of operation was fully reviewed in *Progress Development Corporation* v. *Mitchell*, 286 F. 2d 222 at 230, where the Court stated:

> "Deerfield at present has no Negroes living within its village limits, although some had formerly lived there. Progress, in an attempt to get Negro purchasers into the local housing market, announced its plan to sell 10 to 12 of its 51 houses to Negroes. This percentage was determined by surveying the normal population ratio in the Chicago area which was approximately 78 to 80 per cent white and approximately 22 to 20 per cent non-Caucasian.
>
> "The nature of plaintiffs' efforts to control such percentages in the future was highly controverted before the district court. The court ordered production of purported resale agreements which would give plaintiffs a first option to repurchase the homes of their vendees. Plaintiffs point to the fact that at present no homes have been sold with such agreements and that the resale agreement is only tentative and has not been formally adopted by Progress' Board of Directors. However, the trial court found as a fact that:
>
> " 'On the trial, plaintiffs were unconvincing in their attempts to avoid the stigma of forcing purchasers to execute such agreements by stating that execution of such agreements would be urged but would not be required. It is clear, and I find, from the admissions of plaintiffs' officers and attorney, and from available literature, that plaintiffs intend to control the ratio of Negroes and Caucasians living on the premises in question for ten years and plans to do it by reserving to Progress or its nominee the right to determine the pur-

chaser of the property when an owner desires to resell.'

"On the basis of this finding, the district court held that as a matter of law:

> "'The "controlled occupancy pattern" and resale quota system which Modern Community Developers, Inc., proposes to use in Deerfield through Progress Development Corporation is illegal both as to initial sales and resales. The power of a federal court cannot be used consistently with the Fifth Amendment and the Civil Rights Statutes to impose any percentage quota of Negro or Caucasians. Similarly, State power and authority cannot be constitutionally employed within the restrictions of the Fourteenth Amendment to control either the original or subsequent devolution of realty on a quota basis.'"

This race discrimination planned by Progress Development Corporation followed a pattern previously set by its President, Morris Milgrim.[4]

The other facts established in the Trial Court have been detailed with painstaking care by the learned Trial Judge in his opinion where they are presented without the biased slant of attorneys for Progress Development Corporation. To avoid repetition we call the Court's attention to the Trial Court's opinion at pp. A-1 to A-37 of the Appendix hereto, *infra*.

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4. In reporting that negroes view these quotas as a form of discrimination, The Wall Street Journal, Vol. XLII, No. 210, for August 13, 1962, stated:

> "Morris Milgrim, developer of Concord Park, an eight-year-old 139-home interracial community at Trevoce, a Philadelphia suburb, says he established a ration of 55% white residents to 45% Negro after his sales office initially was 'deluged with Negroes.' To maintain that ratio, he had buyers agree to let him handle resales for the first three years."

SUMMARY OF ARGUMENT.

1. The question of fact has been decided by the state court, and this Court should not re-weigh the evidence and try the case *de novo* on the record.

2. No constitutional or federal question is presented.

3. The need and necessity to use the land for park purposes was both established and conceded. The jurisdiction of the courts was exhausted when this proper municipal function was determined.

4. The alleged motives of the legislative body in exercising the right of eminent domain is not the subject of judicial investigation.

5. A private corporation organized for profit, holding property subject to the right of eminent domain, does not acquire a condemnation-free status by announcing that it intends to force integration through a "controlled occupancy" plan, which plan establishes and maintains a quota system, limiting the number of Negro families and White families who may live on the property.

6. This private corporation organized for profit has had equal protection of the law. All other property owners in Deerfield hold their land subject to condemnation for needed municipal purposes, and many have had their land taken for such purposes. The petitioner here seeks a *preference*—not equality.

REASONS FOR DENYING THE WRIT.

A. The Decision of the Trial Court Was Based Solely On a Question of Fact.

This case is not reviewable by this Court under the jurisdictional statute alleged, 28 U. S. C. 1257(3), since no constitutional rights are involved.

As heretofore pointed out, the issues in this case were raised by the traverse (motion to dismiss) filed by Progress Development Corporation. The issues raised and tried were two factual issues: (1) was there a *bona fide* public need for acquisition for public use, and (2) was there a conspiracy of the Park Board members to deprive Progress Development Corporation of any civil right. The first issue was conclusively proved, no evidence to controvert it was offered and it was, in fact, conceded.

The second issue, that of conspiracy, likewise raised only a question of fact. *United States* v. *Yellow Cab Co.*, 338 U. S. 338; *Barry* v. *Legler*, [illegible] (2d) 297, 303; *Rohlfing* v. *Cat's Paw Rubber Co.* (U. S. D. C. N. D. Ill. E. D., 1954), 17 F. R. D. 426, 430. The lower court found there was no conspiracy, and in affirming, the Illinois Supreme Court made a similar pronouncement. Having decided the case on the *factual* questions presented by the defendant, the Illinois Supreme Court quite properly stated: "No violation of the fourteenth amendment is here involved."

In this case, the question of *fact* has been determined. This was determined after a full consideration of the voluminous evidence produced at the trial level. Regardless of the purpose of an alleged conspiracy, whether allegedly of union members to infringe upon the rights of individuals by use of violence, whether allegedly of business men to interfere with other business men, whether allegedly of these Park Commissioners to interfere with the rights of

this business concern to do business, the question of the existence of the conspiracy is always a question of *fact*. The question of fact is exclusively for the jury, if there be one, otherwise for the court. (*Barry* v. *Legler*, 39 F. (2d) 297, 303; citing many cases; *United States* v. *Yellow Cab Co.*, 338 U. S. 338.) In this case, this question of fact was conclusively determined.

The position of Progress Development Corporation is quite similar to that of the government in *United States* v. *Yellow Cab Co.*, 338 U. S. 338, where the defendants were charged with a conspiracy and also found not guilty by the lower Court. The conspiracy was the basic issue raised. The case came on direct appeal to this Court, not under discretionary jurisdiction.

The government asked the court to do the same as Progress Development Corporation is asking in this case.

> "What the Government asks, in effect, is that we try the case *de novo* on the record, reject nearly all of the findings of the trial court, and substitute contrary findings of our own. Specifications of error which are fundamental to its case ask us to reweigh the evidence and review findings that are almost entirely concerned with imponderables, such as the intent of parties to certain 1929 business transactions, whether corporate officers were then acting in personal or official capacities, what was the design and purpose and intent of those who carried out twenty-year-old transactions, and whether they had legitimate business motives or were intending to restrain trade of their competitors in car manufacture, such as General Motors, Ford, Chrysler and Packard." (p. 340.)

In the present case the trial judge supported his judgment with a detailed opinion prepared with obvious care after opening the evidence door "to its widest point" for Progress. Similarly in the *Yellow Cab* case:

> "The judgment below is supported by an opinion,

> prepared with obvious care, which analyzes the evidence and shows the reasons for the findings. To us it appears to represent the considered judgment of an able trial judge, after patient hearing, that the Government's evidence fell short of its allegations—a not uncommon form of litigation casualty, from which the Government is no more immune than others." (pp. 340-341.)

In the *Yellow Cab* case this Court made the following observations which are particularly appropriate:

> "Findings as to the design, motive and intent with which men act depend peculiarly upon the credit given to witnesses by those who see and hear them. If defendants' witnesses spoke the truth, the findings are admittedly justified. The trial court listened to and observed the officers who had made the records from which the Government would draw an inference of guilt and concluded that they bear a different meaning from that for which the Government contends." (p. 341.)

The facts in this case have now been carefully reviewed by 12 judges. The United States District Court (*Progress Development Corporation* v. *Mitchell*, 182 F. Supp. 681) and the Circuit Court of Appeals (*Progress Development Corporation* v. *Mitchell*, 286 F. (2d) 222), considered this same evidence and found it insufficient to sustain Progress' charges of conspiracy. In the District Court Judge Perry, an experienced trial judge, said at page 700:

> "The plaintiffs were given wide latitude in the production of all proofs possible. All sources of possible conspiracy were minutely examined into by plaintiff's counsel. No conspiracy, or any semblance of conspiracy by the Park Board Commissioners was proved, ..."

Chief Judge Hastings in the Circuit Court of Appeals, speaking for a panel of Judges, said at page 229 in affirming the order of the District Court in denying a preliminary injunction to Progress:

> "We have carefully studied the entire voluminous record of the evidence adduced at the lengthy hearings and conclude that on the basis of the testimony and documents before it, the court was fully justified in denying temporary equitable relief under both Counts I and II. The trial court's findings are not only supported by substantial evidence, but our examination of the record fails to reveal to us any evidence of conspiracy."

The trial judge, Bernard M. Decker,[5] after granting Progress Development Corporation a full hearing with the "evidence door opened to its widest point" and admitting all evidence "bearing even a tinge of materiality" (R. 249, 250, 252) found "the evidence wholly fails to establish the charge of conspiracy against the members of the Park Board." (R. 281-282.)

On the appeal to the Illinois Supreme Court the seven justices unanimously affirmed Judge Decker's order, stating:

> "* * * there is no evidence that any member of the Park Board formed or engaged in any conspiracy to deprive Progress of any of its legal rights."

It is to be noted that every one of the 12 judges who heard or reviewed all evidence in the case, did not just hold that that the alleged conspiracy had not been proved, but held that there was *no* evidence of conspiracy.

This case was decided solely on a non-federal question. This Court has no jurisdiction to issue the writ herein prayed.

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5. Judge Decker, with years of experience on the trial bench, has since been appointed to the United States District Court.

B. Under the Separation of Powers, the Power of the Judicial Branch to Proceed in This Case Has Been Exhausted.

The public need and use for the land involved herein has been conclusively proved and in fact *conceded* by the property owner. Once this step has been reached, the authority of the judiciary to proceed with the case ceases.

1. The Power to Take Property for Public Use by Eminent Domain Is Essential to the Life of the State.

"The taking of private property for public use upon just compensation is so often necessary for the proper performance of governmental functions that the power is deemed to be essential to the life of the state. It cannot be surrendered, and, if attempted to be contracted away, it may be resumed at will. (Citing cases.)" *Georgia* v. *City of Chattanooga* (1924), 264 U. S. 472, 480.

"The right is the offspring of political necessity; and it is inseparable from sovereignty, unless denied to it by its fundamental law. Vatt. ch. 20, 34; Bynk. lib. 2, ch. 15; Kent, Com. 338-340; Cooley, Const. Lim. 584, 35 *seq.*" *Kohl* v. *United States* (1876), 91 U. S. 367, 371-372.

2. The Right of Eminent Domain Is Superior to Property Rights.

"It is superior to property rights (*Kohl* v. *United States*, 91 U. S. 367, 371, 23 L. ed. 449, 451); and extends to all property within the jurisdiction of the state * * *." *Georgia* v. *City of Chattanooga* (1924), 264 U. S. 472, 480.

"No one doubts the existence in the state governments of the right of eminent domain—a right distinct from and paramount to the right of ultimate ownership. It grows out of the necessities of their being, not out of the tenure by which lands are held." *Kohl* v. *United States* (1876), 91 U. S. 367, 371.

"All private property is held subject to the necessities of government. The right of eminent domain underlies all such rights of property. The government may take personal or real property whenever its necessities, or the exigencies of the occasion, demand." *United States* v. *Lynah*, 188 U. S. 445, 465.

3. Necessity, Expediency and Extent of Taking Is a Legislative Question.

"That the necessity and expediency of taking property for public use is a legislative, and not a judicial, question, is not open to discussion. (Citing cases)" *Joslin Mfg. Co.* v. *City of Providence*, (1923), 262 U. S. 668, 678.

"The question is purely political, does not require a hearing, and is not the subject of judicial inquiry." *Joslin Mfg. Co.* v. *City of Providence*, (1923), 262 U. S. 668, 678.

"The necessity for appropriating private property for public use is not a judicial question." *Rindge Co.* v. *Los Angeles County* (1923), 262 U. S. 700, 709.

4. The Legislature May Delegate the Authority to a Municipality, and the Determination of the Municipal Governing Body Is Conclusive.

"Neither is it any longer open to question in this court that the legislature may confer upon a municipality the authority to determine such necessity for itself. (Citing cases)" *Joslin Mfg. Co.* v. *City of Providence*, (1923), 262 U. S. 668, 678.

"The necessity for appropriating private property for public use is not a judicial question. This power resides in the legislature, and may either be exercised by the legislature or delegated by it to public officers. 'Where the intended use is public, the necessity and expediency of the taking may be determined by such agency and in such mode as the state may designate.

> They are legislative questions, no matter who may be charged with their decision, and a hearing thereon is not essential to due process in the sense of the 14th Amendment.' *Bragg* v. *Weaver*, 251 U. S. 57, 58, 64 L. ed. 135, 136, 40 Sup. Ct. Rep. 62." *Rindge Co.* v. *Los Angeles County*, (1923), 262 U. S. 700, 709.

5. The Taking of Land for a Park Is a Public Use.

> "Thus, the condemnation of lands for public parks is now universally recognized as a taking for public use. *Shoemaker* v. *United States*, 147 U. S. 282, 297, 37 L. ed. 170, 184, 13 Sup. Ct. Rep. 361." *Rindge Co.* v. *Los Angeles County*, (1923), 262 U. S. 700, 707-8.

When a proper municipal function—need and necessity to use the land for park purposes—had been established, the jurisdiction of the courts was exhausted.

C. The State Courts Decided This Case in Accordance With Applicable Decisions of This Court.

1. The Motives of the Body Exercising Legislative Discretion Cannot be Inquired Into by the Judiciary.

Progress Development Corporation was faced with the well established and well considered law that courts cannot inquire into motives of legislators. In an attempt to circumvent the law, it first alleged a conspiracy. The Illinois Supreme Court recognized this for what it was—an attempted inquiry into *motives*. Allegations of conspiracy were similarly made in the landmark case of *Fletcher* v. *Peck*, 6 Cranch 87, 129:

> "The second count assigns, in substance, as a breach of this covenant, that the original grantees from the state of Georgia promised and assured divers members of the legislature, then sitting in general assembly, that if the said members would assent to, and vote for, the passing of the act, and if the said bill should pass, such members should have a share of, and be interested

> in, all the lands purchased from the said state by virtue of such law. And that divers of the said members, to whom the said promises were made, were unduly influenced thereby, and, under such influence, did vote for the passing of the said bill; by reason whereof the said law was a nullity, etc., and so the title of the state of Georgia did not pass to the said Peck, etc."

On a demurrer to this plea the Court, speaking through Chief Justice Marshall, recognizing the attack was on *motives* stated at 130:

> "It may well be doubted how far the validity of a law depends upon the motives of its framers, and how far the particular inducements, operating on members of the supreme sovereign power of a state, to the formation of a contract by that power, are examinable in a court of justice."

Another approach used to avoid the *motive* rule, was the substitution of "racial considerations" or "racially motivated" for the word "motives." This exercise in semantics cannot avoid the application of established law to the facts in this case.

The issues in the cases of *Detroit United Railway* v. *City of Detroit*, 255 U. S. 171, and *Soon Hing* v. *Crowley*, 113 U. S. 703 raised factual issues parallel to this case. In the *Detroit United Railway* case, the Council of the City of Detroit adopted an ordinance to have the voters approve a bond issue to secure funds to acquire the property owned by the Railway Company for a city transportation system. This Court commented as follows:

> "The bill abounds in *allegations that voters were misled* by the fraudulent conduct of the officials of the city in their efforts to procure the property of the complainant at less than its value by misrepresenting in a circular and otherwise, the purpose and effect of the vote to be taken upon the question of acquiring a municipal system of transportation. We think that

> *the court below correctly* held that the *motives of the officials, and of the electors* acting upon the proposal, *are not proper subjects of* judicial inquiry in an action like this so long as the means adopted for submission of the question to the people conformed to the requirement of the law. The principle has been declared by this court." (Emphasis supplied.) (255 U. S. 171, 178.)

In *Soon Hing* v. *Crowley* (1885), 113 U. S. 703, where an attack was made against a local ordinance adopted by the Supervisors of the City of San Francisco regulating hours for employment in hand laundries, the plaintiff claimed:

> "* * * that it was adopted owing to a feeling of antipathy and hatred prevailing in the City and County of San Francisco against the subjects of the Emperor of China resident therein, and for the purpose of compelling those engaged in the laundry business to abandon their lawful vocation, and residence, there, and not for any sanitary, police or other legitimate purpose." (P. 710.)

This Court disposed of the claim as follows:

> "The motives of the legislators, considered as the purposes they had in view, will always be presumed to be, to accomplish that which follows as the natural and reasonable effect of their enactments. Their motives, considered as the moral inducements for their votes, will vary with the different members of the legislative body. *The diverse character of such motives,* and the *impossibility of penetrating into the hearts of men* and ascertaining the truth, *precludes all such inquiries* as impracticable and futile. And in the present case, *even if the motives of the supervisors were as alleged, the ordinance would not be thereby changed* from a legitimate police regulation, unless in its enforcement it is made to operate only against the class mentioned; and of this there is no pretense." (Emphasis supplied.) (P. 710-711.)

The validity of ordinances or laws, or other actions by legislative bodies, is tested by *objective standards* applied by the judiciary. There is certainty in the law that if these standards are met, the legislative action is valid. Were it otherwise, and the *motive* of the legislative body be subject to judicial inquiry, there would be no certainty in any legislation. Identical legislative actions taken by two different legislative bodies could be valid in one instance and invalid in the other, because of different "motives" of the legislators in enacting the legislation.

If validity of municipal legislation is to depend upon "motives" of the legislators, instead of municipal purpose, most municipal ordinances and zoning regulations will end up in the courts and Pandora's Box will be opened. The race to the courts had already started in Illinois.[6]

In *Fletcher* v. *Peck*, 6 Cranch 87, 130, Chief Justice Marshall recognized the limitations on the judiciary:

> "If the principle be conceded, that an act of the supreme sovereign power might be declared null by the court, in consequence of the means which procured it, still would there be much difficulty in saying to what extent those means must be applied to produce this effect. Must it be direct corruption, or would interest or undue influence of any kind be sufficient? Must the vitiating cause operate on a majority, or on what number of the members? Would the act be null, whatever might be the wish of the nation; or would its obligation or nullity depend upon the public sentiment?
>
> If the majority of the legislature be corrupted, it may well be doubted, whether it be within the province

6. See The University of Illinois Chicago campus case—*The City of Chicago* v. *R. Zurick Co.*, Docket Nos. 37652 and 37653 (decided by the Illinois Supreme Court on February 28, 1963) where "defendants seek to question the motives of the authorities in designating the areas as slums." In ruling "the motives that prompt the taking are not the subject of judicial investigation", the Illinois Supreme Court cited the instant case.

> of the judiciary to control their conduct, and, if less than a majority act from impure motives, the principle by which judicial interference would be regulated, is not clearly discerned."

Despite these restrictions on the judiciary, the trial judge allowed Progress Development Corporation to produce all evidence it desired to introduce. He found that the members of the Park Board had no motives to discriminate against Progress Development Corporation. (R. 278-279.)

The cases cited by attorneys for Progress Development Corporation do not present any contrary rule or any modification of the "motive" rule. In each case either the legislation was discriminatory on its face or there was discrimination in enforcement. *Gomillion* v. *Lightfoot*, 364 U. S. 339, is illustrative. In that case the illegal purpose was clear from the face of the act. The municipal officials, charged with racial discrimination, "never suggested, either in their brief or in oral argument, any countervailing municipal function which Act 140 is designed to serve." (p. 342.) By contrast, in the instant case, the legislative act authorizing the condemnation is not discriminatory on its face and the opponents have *conceded* that the acquisition does and will serve a needed municipal function.

2. Public Use and Necessity Are Not Affected by the Landowner's Proposed Use of the Property.

Progress Development Corporation says that since it announced its "controlled occupancy" plan to sell some houses to negroes, its proposed use of the land became superior to the municipal need. The trial judge put his finger on it when he stated:

> "Stripped to its essentials the contention of Progress is that the residents of Deerfield had no legal right

> to make a choice between the use of Progress' land for park purposes for the benefit of the general public of Deerfield in preference to its use by the defendant for a private residential development." (R. 277.)

Condemnation does not present a contest between the public use and the landowner's proposed use. The sole issue is the public need and use. The landowner's use is irrelevant. This is true even when that landowner announces that it intends to force integration through a "controlled occupancy pattern" which establishes and maintains a quota system, limiting the number of Negro families and the number of white families who may live on the property.

The right of eminent domain cannot be controlled or defeated by want of consent of private parties.

> "* * * the absolute necessity that the means in the Government for performing its functions and perpetuating its existence should not be liable to be controlled or defeated by want of consent of private parties or of any other authority'." *Kohl* v. *United States* (1876), 91 U. S. 367, 373.
>
> "If the right to acquire property for such uses may be made a barren right by the unwillingness of property holders to sell, or by the action of a State prohibiting a sale to the Federal Government, the constitutional grants of power may be rendered nugatory, and the Government is dependent for its practical existence upon the will of a State, or even upon that of a private citizen. This cannot be." *Kohl* v. *United States* (1876), 91 U. S. 367, 371.

3. The Landowner Is Not Seeking Equal Protection—It Is Seeking a Preferred Status.

Equal protection would afford Progress Development Corporation the same rights and limitations as any other land owner in Deerfield Park District—nothing more and nothing less. This corporation argues, however, that of

of the landowners in the Park District, its land alone is exempt from condemnation to fill a conceded public need.

In determining whether Progress Development Corporation stands on a "condemnation-free plateau," relieved of the restrictions of every other private owner who holds his title subject to condemnation, we suggest a careful examination of this corporation.

Chief Justice Hastings made such examination. His opinion, which had the unanimous approval of the United States Court of Appeals, stated:

> "Since all parties have attempted to inject a racial issue into these proceedings, it seems appropriate to comment on the real issue involved in this litigation. The Plaintiffs are two corporations organized for profit utilizing only private capital in their operations. No federal agency and no federal funds are involved. For reasons best known to themselves plaintiffs have widely advertised and proclaimed a sales policy based upon a controlled occupancy plan with a quota system they have deemed best suited for the social progress of Deerfield. Some of the citizens of the Village of Deerfield have openly voiced their objections to such a plan and in doing so have exercised their constitutional right of freedom of expression and peaceable assembly. Other citizens of that community have exercised a similar right to express an opposite viewpoint. Plaintiffs have alleged that the conduct of the former group, acting in concert with lawfully constituted Village officials, amounts to an unlawful conspiracy designed to cause such officials to subvert their lawful powers of condemnation and enforcement of local building ordinances to the end that plaintiffs are deprived of their lawful right to engage in business and make a profit. * * * This case is that and nothing more.
>
> "In this case no *individual* claims to have been denied a personal right. No one claims he has been denied the right to purchase a home. No one claims he has been denied the right to vote, to go to school,

> to live in a certain place, to eat in a public place, to seek transportation without interference or to work or worship as he chooses. We are concerned with the corporate right to engage in business and make a profit." (Emphasis by Court.) *Progress Development Corporation* v. *Mitchell*, 286 F. 2d 222, 234.

With reference to the "corporate right to engage in business and make a profit," the Progress Development Company *method* of operation raised controversies in the community. We have set forth this plan of operation in our Statement. (*Supra*, pp. 10-12.)

This clear-cut picture of Progress Development Corporation does not place it on a "condemnation-free plateau." It is a corporation organized for profit. The fact that it announced an *intention* to place into operation a "controlled occupancy" plan, whereby *it* would determine the ten to twelve Negroes, and *no more*, who would move into the development did not elevate it to that privileged plane. Nor did the fact that it would sell to only 39 to 41 *white* persons, provide this elevation.

We respectfully suggest that the announcement by this corporation, organized for private profit, that it intends to enter into this program in the *future*, does not abrogate the fundamental law that every private owner of property holds his title subject to the sovereign power of eminent domain. Nor does the fact that the announced *future* plans include a sales policy based upon a *controlled occupancy* plan with a *quota of Negroes*, which the organizers of this corporation deem best suited for the social progress of Deerfield, alter the law. Likewise, community disagreement with this discriminatory method of operation does not give this corporation special rights not given to others. Progress Development Corporation's property, as any other property, is subject to the right of eminent domain.

Quota systems have been reviewed by the courts and have been consistently disapproved as discriminatory.

In *Hughes* v. *Superior Court*, 339 U. S. 460, a grocery store was picketed because it failed to hire Negro clerks in accordance with a "quota system" (p. 463) based upon the proportion of Negro customers. Disregarding an injunction to cease picketing, the petitioners were found guilty of contempt. Mr. Justice Frankfurter in affirming the contempt convictions quoted with approval (pp. 463-64) the California State Supreme Court when, in affirming the convictions, it said:

> "It was just such a situation—an arbitrary discrimination upon the basis of race and color alone, rather than a choice based solely upon individual qualification for the work to be done—which we condemned * * *. The fact that those seeking such discrimination do not demand that it be practiced as to all employees of a particular employer diminishes in no respect the unlawfulness of their purpose; they would, to the extent of the fixed proportion, make the right to work * * * dependent not on fitness for the work nor on an equal right of all, regardless of race, to compete in an open market, but, rather, on membership in a particular race. If petitioners were upheld in their demand then other races, white, yellow, brown and red, would have equal rights to demand discriminatory hiring on a racial basis. Yet that is precisely the type of discrimination to which petitioners avowedly object."

Henderson v. *United States*, 339 U. S. 816, presented a similar question in railroad dining cars. A railway company apportioned facilities in the ratio that the number of white and Negro passengers, who ordinarily applied for service, bore to each other. Neither race could sit at tables reserved for the other. The District Court sustained the rule (p. 822) as "proportionately fair." This Court reversed, observing:

> "The right to be free from unreasonable discrimina-

tion belongs, * * *, to each particular person * * *. Under the rules, only four Negro passengers may be served at one time and then only at the table reserved for Negroes. Other Negroes who present themselves are compelled to await a vacancy at that table, although there may be many vacancies elsewhere in the diner * * *. The rules imposed a like deprivation upon white passengers whenever more than 40 of them seek to be served at the same time and the table reserved for Negroes is vacant. (pp. 824-825.)

* * * * *

"That the regulations may impose on white passengers in proportion to their numbers, disadvantages similar to those imposed on Negro passengers is not an answer * * *. Discriminations that operate to the disadvantage of two groups are not the less to be condemned because their impact is broader than if only one were affected." (pp. 825-826.)

A quota system in rental housing was condemned in *Taylor* v. *Leonard*, 103 A. 2d 632 (N. J., 1954). There a public housing authority admittedly refused to rent a larger percentage of units to Negroes than their number bore to the total population of the city. The New Jersey court quicky found such a scheme invalid under both the State and Federal Constitution, saying (p. 633):

"The use of any quota system in admitting Negroes to public housing projects is discriminatory. * * *

"It is immaterial that the quota actually used bears some relation to the percentage of Negro population in the particular municipality.

"The evil of a quota system is that it assumes that Negroes are different from other citizens and should be treated differently. Stated another way, the alleged purpose of a quota system is to prevent Negroes from getting more than their share of the available housing units. However, this takes for granted that Negroes are only entitled to the enjoyment of civil rights on a quota basis."

The exact pattern this Court has held illegal was followed in this case with a quota system the organizers of Progress "deemed best suited for the social progress of Deerfield." This illegal pattern gave Progress no rights superior to others.

Progress Development Corporation's entire argument is that it was denied equal protection of the laws. This presents the question of wherein the inequality lies. Many people in Deerfield have had their land taken for municipal purposes for schools, parks, village hall, village garage, sewerage disposal plant, fire station, library, township hall, parking areas and other municipal uses. Each of the people owning the land before it was acquired for municipal use, held title subject to the superior right of the municipality to take the land for municipal use, *regardless of the use the landowner was making of it or proposed to make of it.* Each landowner was paid the value of the land and could purchase other land or use the money for any purpose he desired.

Progress Development Corporation is being accorded *equal* treatment. It is a corporation attempting to make money by subdividing land and selling it for a profit. It *concedes* that the land being acquired is needed for a necessary municipal purpose and will be used for public municipal purposes. But it says it should be treated differently than any other property owner in Deerfield, that it has not only *equal* rights, but rights *superior* to any other landowner in Deerfield. Its position is that the conceded necessity of the land for public municipal use becomes subservient to the use this business concern plans to make of the land. The power of the state to carry out its governmental functions becomes secondary to the desire of this money making business concern. This corporation, as equally as any other property owner in Deerfield, can take

the $166,199.91 which it has agreed is the fair value of the land being taken for an admitted municipal purpose and purchase other land in Deerfield or anywhere else it pleases to develop for whatever profit it can make. All other property owners are treated in *exactly* the same way.

This business corporation has been accorded protection absolutely equal to that accorded all other property owners in Deerfield. It is seeking a *preference*—not equality.

CONCLUSION.

There is no constitutional question involved. This private corporation, organized for profit, attempted to secure a condemnation-free status through the device of alleging Park Board Commissioners engaged in an unlawful conspiracy against it. The fact question raised under that charge was decided adversely to this corporation, with no dissent, by 12 judges.

The Petition for Writ of Certiorari seeks a review of the facts by an exaggerated and prejudiced statement of activities in the community resulting from the "controlled occupancy" plan announced. The opposition engendered to this discriminatory practice, which violated the constitutional rights of both Negro and White persons, is used as the basis for charging that the Supreme Court of Illinois failed to afford equal protection to "Negro Americans".

As the trial judge stated:

> "Progress has already agreed to accept the sum of $166,199.91 as fair compensation for its two properties. It has had its full hearing upon the issues raised by its motion to dismiss. The evidence establishes without question that the taking of this property is necessary and for a public purpose. The evidence wholly fails to establish the charge of conspiracy against the members of the Park Board. In this situation Progress, as any other citizen, must yield to the paramount right of the Park District to take private land for public use.

"Nothing in this decision will affect or impair in any way the admitted right of Progress to carry on its business at any other location where it may be authorized to build homes and at its election to sell a selected number of these homes to members of the Negro race." (R. 281-282.)

Like the other four property owners, whose land was acquired from the funds raised in the December, 1959 election, Progress Development Corporation has had equal treatment. It can use the condemnation award to continue in its attempt to profit from trafficking in the volatile field of race relations.

The Petition for Writ of Certiorari is without merit and should be denied.

Respectfully submitted,

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APPENDIX.

DEERFIELD PARK DISTRICT vs. PROGRESS DEVELOPMENT CORPORATION, ET AL.

Memorandum of Opinion of Trial Court October 18, 1961.

R. 246

MEMORANDUM OF OPINION.

This is a condemnation suit brought by the Deerfield Park District against the Progress Development Corporation. Progress is in the busines of acquiring residential subdivisions and constructing and selling home sites thereon.

The land involved consists of two separate parcels owned by Progress, one known as Floral Park and the other as Pear Tree. Floral Park is a fifteen acre tract which the Park District seeks to condemn for general recreational purposes, and Pear Tree is a six and a half acre tract which the Park District plans to convert into the only

R. 247

swimming pool in the Village of Deerfield.

Progress acquired these two parcels and subdivided them in July and August of 1959, for the purpose of erecting thirty-nine homes in Floral Park and twelve homes in Pear Tree.

By the middle of November, 1959, Progress had commenced the construction of two homes in Floral Park. While this construction was still in progress the news reached the public in Deerfield that Progress intended to sell some of its homes in Floral Park to Negroes.

Thereafter on December 7, 1959, the Park Board took formal action to designate Floral Park and Pear Tree as park sites, and ordered that they be acquired by condemnation proceedings for park purposes. Progress rejected the offer of the Park Board to purchase these two subdivisions for $166,199.91. At the same time the Park Board by proper resolution provided for a referendum to be held on December 21, 1959, and submitted to the voters of the district a $550,000.00 bond issue, $175,000.00 of which was designated for the purchase of the two subdivisions owned by Progress, wtih the remainder of the bond issue to cover the acquisition of four other park sites of approximately fifty eight acres, making a total of approximately eighty acres in six tracts.

On December 21, 1959, the bond issue referendum was held and was approved by approximately a two to one vote.

This condemnation proceeding was filed on December 24, 1959, and is concerned only with the two subdivisions in question. On December 22, 1959, Progress filed a com-

plaint in the United States District Court for the Northern District of Illinois against the Park District, the Village of Deerfield and members of their respective boards, together with other individuals, alleging a conspiracy to deprive Progress of its civil rights and seeking to enjoin the Park District from condemning its land. After

a series of hearings the District Court denied injunctive relief and dismissed the complaint.

Thereafter on March 11, 1960, Progress filed a motion in the present case to dismiss the condemnation proceedings on five grounds:

1. That a prior action is pending between the petitioner and one of the defendants in the United States District Court involving the same subject matter.

2. That the filing of the condemnation petition is an overt act in a conspiracy to deprive Progress of its civil rights.

3. That there is no *bona fide* public need for acquisition of this property for public use.

4. That petitioner did not negotiate or bargain in good faith.

5. That the acts of the petitioner in conspiracy with others are abuses of the power of eminent domain.

This court struck grounds 1, 2 and 5 and ordered a hearing on grounds 3 and 4.

Upon this hearing the Park District introduced evidence of its resolution designating this land as necessary for park sites and authorizing its acquisition. They further proved the offers to purchase and their refusal. Progress then submitted a fifty paragraph request for admission of

facts which was treated as an offer of proof. Objections were sustained to this offer and Progress offered no further proof. The parties stipulated to the fair market value of the premises, and an order of condemnation was entered.

Progress then appealed to the Supreme Court of Illinois from this order charging that it had been restricted in making proof of its charges that the present condemnation proceeding is a part of a conspiracy to deprive Progress of its civil rights. The Supreme Court determined that although Progress' offer of proof was "replete with unsupported conclusions and voluminous allegations of fact which appear to be completely immaterial to any issue in the case," nevertheless the remaining allegations were sufficient to charge the Park District with using the power of eminent domain for "the sole and exclusive purpose" of preventing the sale of homes by Progress to Negroes in violation of Progress' right to equal protection of the law. The order of remandment is couched in this language: "This cause is remanded to the Circuit Court of Lake County for the sole purpose of permitting Progress a full hearing on the question of whether this taking is necessary and for a public purpose." (*Deerfield Park District* v. *Development Corporation*, 22 Ill. (2) 132, 141.)

The full hearing sought by Progress has now been held upon all the issues raised by its motion to dismiss. Progress again offered much of the same evidence contained in its original offer of proof upon the first trial. The Park District objected to a large portion of this evidence on the ground that it was immaterial under the terms of the

mandate of the Supreme Court. Notwithstanding this objection all evidence offered by Progress, bearing even a tinge of materiality, has now been admitted.

In its opinion the Supreme Court said (p. 139): "The material questions of fact are whether or not Deerfield

needed park sites; whether or not Progress' property is suitable for park sites, and whether or not these sites will be devoted to public use." The petitioner, Park District, limited its evidence to these issues. A summary of this evidence follows:

Petitioner placed on the stand Roy Layman, a landscape architect and city and park planner whose qualifications were admitted by both parties. Layman had worked for the Park District for about three years prior to the present proceeding. In the spring of 1959, prior to the acquisition of any property in Deerfield by Progress, Layman made a survey of the entire park district to determine what land was suitable and available for park purposes. During the course of this survey the witness inspected and walked upon all of the land that was available in the district, including the two properties involved in this proceeding, Floral Park and Pear Tree. Floral Park was visited twice and on one of these occasions Edward Walchli, one of the members of the Park District, walked over the ground accompanied by Layman. After these visits Layman prepared a map of the Park District which is approximately conterminous with the boundaries of the Village of Deerfield. This map was used by the witness when he appeared before the Park Board on May 19, 1959. Floral Park was shown on this map and was colored in yellow, along with

R. 251

a number of other locations to be considered by the Board as possible park sites. The witness stated that at this meeting he made a recommendation to the Park Board that it acquire the Floral Park site for park purposes, and that it also acquire the Pear Tree site as a secondary site for

a swimming pool. At this same meeting a recommendation was made to the Park Board that an existing park "Jewett Park," be used as a site for a number one swimming pool.

In August 1959 a referendum was held at which the voters were asked to approve a bond issue for the purpose of building a swimming pool in Jewett Park. This bond issue was defeated. After this occurred, and after the present suit was filed, the witness recommended Pear Tree as the primary swimming pool site.

Layman further testified that on December 24, 1959, (the date of the filing of this condemnation proceeding) the Deerfield Park District needed two-hundred and fifty acres of land for park purposes and had a usable park acreage of only forty-seven acres or less than twenty per cent of the land needed to properly carry out its functions. The witness gave his opinion that both Floral Park and Pear Tree were suitably located and proper and necessary sites for public park purposes on the date of the filing of the petition.

James C. Mitchell, the president of the Park District, testified to the definite need for the acquisition of additional land for park purposes, and gave his opinion as to the suitability of these two sites for such use. He testified that Floral Park will be developed and used as a play-ground area with provisions for football, baseball

and the general normal functions of a park. The witness further stated that Pear Tree would be used as a swimming pool for use by the general public, there being no other public swimming pool within the Village of Deerfield.

It was stipulated that each of the other park commis-

sioners would give the same testimony as that given by the Board president.

When petitioner closed its case it was then incumbent upon the defendant Progress in the words of the Supreme Court opinion (p. 141) "to prove by material facts that the exercise of eminent domain in the instant case was not necessary, and was not to be devoted to a public use, but was for the sole purpose of depriving Progress of the right to do business."

Progress produced a number of witnesses who were allowed to testify as to facts within their knowledge relating to an alleged conspiracy, which Progress claimed was entered into by the members of the Park Board and others for the purpose of preventing it from developing its two properties and selling some of its homes to Negroes. When witnesses who had testified in the conspiracy case in the United States District Court were shown to be not available it was stipulated that these witnesses would give the same evidence if tendered in this proceeding.

With the evidence door thus opened to its widest point Progress was permitted to show the following facts:

The public and members of the Park District first learned in the middle of November 1959 that Progress intended to sell some of its homes in Floral Park and Pear

R. 253

Tree to Negroes. Both the members of the Park District and the School District 110 (the district within which the two properties are located) were aware of the plans of Progress to develop these two subdivisions, and the school District had approved an arrangement under which the builder was to contribute to the district $350.00 for every

home built. The building plans for the two houses which were in the progress of construction had already been approved by the Village Board of Trustees.

Prior to November 1959 no reference appears in the official minutes of either the Park District or the School District specifically mentioning either of the two sites in question for any purposes except the arrangement for financial contribution hereinabove referred to. However, there is an oblique reference to Pear Tree in the minutes of the Park Board meeting of May 19th which deals with the report given to the district by the park planner, Mr. Layman. In this report Layman first recommends the location of a new swimming pool at some location east of the tracks and then says, "If the population does reach 26,000 or more, it might be practical to build another smaller pool in the vicinity of or west of Wilmot Road," (this being the general location of the Pear Tree site.)

Progress introduced the testimony of three members of the Park Board who each testified that the Board had considered the Floral Park and Pear Tree sites prior to their acquisition by Progress.

Board member Walchli testified that prior to the May 1959 meeting he was told by the Board to accompany the park planner, Roy Layman, to inspect possible park

sites throughout Deerfield. One of the sites that they visited and walked upon was Floral Park. On this same occasion they drove to Pear Tree and inspected it from the road.

Board member Dewey testified that the Board first discussed acquiring the Floral Park and Pear Tree properties for park purposes in May of 1959, although at this time these parcels were not considered for purchase. Practically the same testimony was given by Aksal Petersen, another member of the Park Board.

Progress labels the foregoing as background evidence.

The following evidence was produced by it to show the alleged conspiracy:

On the night of November 11, 1959, two Deerfield residents appeared at the Village Board meeting and reported to its president, Joseph Koss, a rumor that Progress intended to sell some of its homes in Floral Park and Pear Tree to Negroes. At the conclusion of the meeting this information was given to the other members of the Board.

Subsequently on three different occasions stop orders were issued by the Village Building Commissioner for alleged violations of the building code in the construction of the two homes which Progress had commenced building in Floral Park. No stop orders had been issued prior to this time. (In the Federal District Court proceedings detailed evidence was offered by both parties as to the reason for these stop orders. No such detailed evidence was offered in this proceeding.)

R. 255

On November 17, 1959, the Park Board held a meeting attended by a number of residents of Deerfield, including Joseph Powell, head of a local group known as the Deerfield Citizens Committee. This committee had been in operation for a number of years, its purpose being to examine civic needs in Deerfield and to make recommenda-

fions. On prior occasions the committee had taken positions with reference to the acquisition of park sites. At this meeting Powell advised the Park Commissioners that his committee had been working on its report for the past year, except during the summer months, and that it was almost completed and would be ready for presentation in about two weeks. The Park Board then adjourned its meeting to December 7, 1959.

On November 18, 1959, the Village Board of Trustees met. The plans of Progress were not discussed at the official meeting. After the meeting adjourned the crowd which was on hand remained and a public discussion took place concerning the Progress project. At this time "an unidentified woman" stated that a petition would be circulated to stop the Progress subdivision from becoming a reality.

The Village Board held another crowded meeting on November 23, 1959, attended by members of the press and other news media. This meeting was devoted to an explanation by representatives of Progress as to the type of home it proposed to construct in Floral Park, and its plans to sell a number of these homes to Negroes. During a recess of this meeting one Harold Lewis (one of the defendants in the conspiracy action in the Federal Court) stated

R. 256

that while the Supreme Court had settled the legality of integration he was opposed to the methods employed by Progress, and that opposition to such project "should be confined to such legal possibilities as might exist."

After the Board meeting adjourned on November 23, 1959, a public meeting was held in the American Legion

Hall across the street. A newspaper reporter, Dorothy Arns, testified that at this meeting one Carl Bagge, an attorney, stated that a group of attorneys would assist Mr. Lewis in doing something about the integrated subdivision. In this same speech Bagge is alleged to have reminded the group that the previous bond referendum for park purposes had been defeated, but that opinion in Deerfield had changed and that it might be possible now to get a referendum passed. It was at this meeting that some of the people present suggested that an organization be created with Mr. Lewis as chairman. Thereafter the North Shore Residents Association, an informal organization, was formed.

On November 24, 1959, another public meeting was held at the Deerfield Grammar School at which both Mr. Koss, the Village President, and Mr. Lewis, the President of the newly formed North Shore Residents Association, spoke on the subject of the Progress subdivision.

Within a few days thereafter a number of members of the newly formed North Shore Residents Association met at the home of John Jursich. At this time plans were made to raise funds for the association, and to place a full page ad in the Deerfield Review to be run on December 3, 1959. This ad, after referring to the Floral Park sub-

division as a racially integrated housing project went on to say, "a legal committee is conducting an extensive study of law on the matter, and effective plans have been devised."

The ad concludes as follows: "The vast majority of the people of Deerfield are certain that they are morally

right in resisting this thing, and they are convinced a small group of outside developers, no matter how lofty their claimed objective, cannot master legal technicalities to compel 16,000 Deerfield residents to submit to their dictates." No member of the Park Board was present at this meeting at the Jursich home.

A second meeting took place at the Jursich home on December 3, 1959, which was attended by James Mitchell, the president of the Park Board, along with Harold Lewis and several other members of the North Shore Residents Association. Lewis testified that he had received a telephone call to the effect that Mitchell and the Park Board were planning some kind of a bond issue referendum, and if this were the case he, Lewis, thought it would be a bad idea "for both of us to be out trying to raise funds." Lewis further testified that he asked Mitchell at this meeting whether he could tell him anything about the bond issue referendum, and that Mitchell thereupon told him "It was none of my business," and that they talked about a few general things and Mitchell then left. While Mitchell was present at the meeting the subject of integration was not discussed.

On December 5th and 6th, 1959, the North Shore Residents Association took a poll of Deerfield residents to

determine how many favored and how many opposed the proposed integrated housing development at Floral Park, and the result of the poll was 3500 opposed, 400 in favor and some 50 expressed no opinion.

On the evening of December 6, 1959, James Mitchell and Edward Walchli of the Park Board went to Joseph

Powell's home and at this time received from Powell the report of the Citizen's Committee which was to be delivered to the members of the Park Board on the next day. This report was general in nature and referred to an over-all plan of civic improvements within the Village of Deerfield, including the acquisition of further park sites.

On Monday night, December 7, 1959, the Park Board met at its adjourned meeting and adopted formal resolutions for the purpose of condemning Floral Park and Pear Tree, and authorized submitting offers of purchase to Progress. Following this meeting, Mitchell and Walchli of the Park Board went to the home of John Jursich and at that time delivered the offers of purchase to certain members of the Residents Association for the purpose of serving them personally upon Progress in Chicago the next morning. This meeting was also attended by Harold Lewis of the Residents Association.

On the next day, December 8, 1959, when a newspaper reporter questioned Catherine Price, Secretary of the Deerfield Park Board, as to the reasons for continuing the Park Board meeting from November 17th to December 7th, Mrs. Price is alleged to have stated that this was for the purpose of having the answers to the poll that had been

taken by the members of the North Shore Residents Association, and that the Park Board had an understanding if the answers were not back by December 7th the Board would have met and adjourned to a later date after the answers had been received.

On the morning of December 8, 1959, Progress received the two written offers to purchase the Floral Park and

Pear Tree properties which had been authorized at the Park Board meeting the night before.

The entire record in this case has now been summarized. It is on the basis of this record, and this record alone, that a determination must be made of the legal rights of the parties.

Petitioner asserts that the evidence produced by it clearly establishes that the taking of Progress' two properties is necessary and for a public purpose, and that it is therefore entitled to proceed with this condemnation.

Any objective appraisal of the evidence in this case bearing on these particular issues can lead to no other conclusion than that a definite need existed in the Village of Deerfield for more park areas at the time this suit was filed, and that these two parcels of land owned by Progress, and now known as Floral Park and Pear Tree were and are suitable for such park use. Although no definite plans had been made by the Park Board to purchase either parcel prior to the institution of this suit, it is uncontradicted that the park planner employed by the Park Board had recommended the future acquisition of both parcels to the Park Board as early as May 1959 before any of Progress'

R. 260

plans were known. Progress in its brief filed in this proceeding makes no attempt to deny the need of more parks in Deerfield, and concedes that if a final award of condemnation is entered that the Park Board will in fact devote both sites to public use, one for general park purposes and the other for a swimming pool.

It is Progress' contention that even with this showing of admitted necessity and public purpose that the petitioner

is still not entitled to condemn these two parcels because of an alleged "conspiracy" participated in by members of the Park Board and others to deprive Progress of its right to develop its properties and to sell some of its homes to Negroes. Progress asserts that the evidence shows that this illegal purpose is the "sole and exclusive purpose" of this condemnation and not any claimed need for more parks.

Although "conspiracy" is the only defense raised to the otherwise admitted right of the petitioner to condemn, neither party has discussed the legal principles which must be applied in appraising the evidence bearing upon this issue. Without some legal orientation a charge of conspiracy becomes nothing more than a broad accusation challenging the conduct of a group of persons without specifying any particular illegal act.

By definition a conspiracy is an unlawful combination of two or more persons to do that which is unlawful in itself or to do that which may be lawful but by unlawful means. A common design is the essence of the charge. Although evidence is not required of any express or formal agreement it is still necessary to establish by proof that

R. 261

a conspiracy in fact existed, and that each of the members in some way or manner did, through some contrivance, positively or tacitly come to a mutual understanding for the purpose of accomplishing a common and unlawful plan. Mere knowledge, acquiescence or approval of an act or course of conduct without cooperation or agreement to cooperate is not enough to charge one as a party to a conspiracy, but there must be intentional participation in

the transaction with a view of furthering a common purpose. The proof must be clear and convincing; the evidence to be considered must do more than raise a mere suspicion on which a conjecture or speculation as to the existence of a conspiracy might be based. (*Tribune Co.* v. *Thompson*, 342 Ill. 503, 529, 550; *Bergerson* v. *Mullinix*, 399 Ill. 470, 475; *Marino* v. *United States*, (9th Cir. 1937) 91 Fed. (2d) 691, 694; *United States* v. *Thomas*, 52 Fed. Supp. 571, 580.) Progress' evidence must be viewed in the focus of these basic principles.

After proofs had been closed in this case Progress was asked to prepare a summary of its evidence, listing the names of the alleged conspirators and specifying the particular activities of each in furtherance of the alleged conspiracy.

In its answer Progress names all of the members of the Park Board as conspirators along with certain members of the North Shore Residents Association, certain Trustees of the Village of Deerfield and Joseph Powell of the Deerfield Citizens Committee. The activities listed as to each of these individuals are substantially the same activities as have been already detailed. Progress has a conspiracy

action against all of these defendants still pending in the Federal District Court. The conduct of these other persons becomes relevant here only in determining whether a conspiracy has been shown in which the members of the Park Board themselves participated. Common justice requires that the membership of any person in a claimed conspiracy must first be proved by evidence as to his own conduct and by what he himself said or did—not by what others may have said or done.

Judged by these standards it is immediately apparent that Progress has offered no evidence whatever which directly or indirectly involves three of the members of the Park Board in the claimed conspiracy. As shown by their testimony in the Federal Court proceedings (admitted by stipulation here) commissioners Dewey and Petersen did not attend any of the meetings or participate in any way in any of the activities which Progress now questions. The only evidence as to the other commissioner in this group, Keller, is that he wrote a letter to a Deerfield paper which was published on November 26, 1959, objecting to the manner in which Progress was attempting to "foist" its ideas upon the Deerfield community and again stated these same views at two public meetings which he attended. If the mere expression of common views is enough to constitute one a member of a conspiracy without some further evidence of participation in a common unlawful design then no member of the public would be safe in expressing his opinion on any controversial subject. The Supreme Court of Illinois in its opinion in the appeal taken in this case made this comment on this type of evidence at pages 138 and 139: "We think it of no importance

that the citizens of Deerfield and even a member of the Park District Board were opposed to the policy of controlled occupancy adopted by Progress." (22 Ill. (2d) 132.) Apparently Progress itself did not attach any particular significance to these statements because these activities of Keller were not even mentioned in the summary furnished by it.

Progress had singled out only two members of the Park Board who are particularly charged with furthering the

alleged conspiracy, the Board president Mitchell and the member Walchli. The principal conspirational activities charged against these two are—

1. They participated in private meetings of the Residents Association at the home of John Jursich on December 3rd and 7th, 1959.

2. They participated in a private meeting at Joseph Powell's home on December 6th, 1959, at which time they received from Powell the report of the Citizens Committee.

3. They voted for the condemnation of Progress' properties at the Park Board meeting on December 7, 1959, and thereafter caused the present suit to be filed.

The meeting of December 3, 1959, can be quickly disposed of—Mitchell's only participation in this meeting was to tell Harold Lewis of the Citizens Committee (in response to a question by Lewis as to the Park Board's plan for a referendum) that "it was none of his business." There is no evidence that Walchli even attended this meeting.

R. 264

The conspirational act relied on at the meeting of December 6, 1959, at the Powell home was the receipt by these two Park Board Commissioners from Powell of the Citizens Committee report, which is termed by Progress as a "colorable device" to justify the later condemnation. The Park Board had received other reports from this same Citizens Committee. This report represented approximately a year's work most of which antedated the Progress controversy. The document bears the innocuous title, "The Growing Village of Deerfield," contains only general recommendations, and is totally undeserving of any role in an alleged conspiracy.

The informal meeting of December 7th at the Jursich home took place *after* the Park Board had already adopted resolutions providing for the acquisition of Progress' two properties, and the submission of the referendum to the voters of Deerfield in the amount of $550,000 to provide funds for the purchase or acquisition of a total of six park sites including Floral Park and Pear Tree. At this meeting Mitchell and Walchli admittedly discussed the proposed referendum, and sought the aid of the persons present in supporting the referendum including Lewis, the vocal president of the Residents Association.

These are the only specific charges made against the members of the Park Board, and it is on this tenuous evidence that Progress bases its claim that the "sole and exclusive purpose of this condemnation" is to prevent it from carrying on its lawful business.

Progress itself recognizes the weakness of its position. It concedes that there may have been a need for more parks

in Deerfield at the time this suit was filed. It does not deny that its properties are suitable for park purposes. It admits that if a final award is made that the Park Board will in fact devote these two sites to park purposes for the benefit of the general public. Having made these concessions Progress still denies the right of the petitioner to condemn upon its claim that the condemnation would not have been filed "but for" the news about Negroes, and if this is so, Progress argues, the real purpose of the proceeding must be to discriminate against it and not to provide for more parks. In this contention lies the crux of this controversy.

The first answer to this contention is that Progress is seeking something to which it is not legally entitled—a judicial inquiry into the motives of the members of the Park Board, i.e. their reasons for filing this suit.

The Supreme Court of Illinois in the appeal taken in this case pointed out to Progress that it was not entitled to make such an inquiry when it said at page 140:

> "From an examination of the record in the case at bar, it is apparent that many of the allegations of Progress are framed for the purpose of directing a judicial inquiry into the motives of the individual members of the Park District Board, rather than into the actual purpose for which this land is sought. This is clearly an inappropriate area for judicial inquiry. (*Detroit United Railway* v. *City of Detroit*, 255 U. S. 171, 178, 65 L. ed. 570; *Soon Hing* v. *Crowley*, 113 U. S. 703, 701, 710, 28 L. ed. 1145; *Sinclair Refining Co.* v.

R. 266

> *City of Chicago* (7th Cir.), 178 F. 2d 214, 217.) As we stated in *Ligare* v. *City of Chicago*, 139 Ill. 46, in a condemnation case the purpose for which the power of eminent domain is exercised may be questioned, but 'the motives that may have actuated those in authority are not the subject of judicial investigation.' We cannot see how the rule could be otherwise."

The rule forbidding an inquiry into legislative motives, where a valid legislative purpose is being served, has been followed in other Illinois cases.

In *Wolback* v. *Rubens*, 307 Ill. 186, an attempt was made to challenge the validity of a municipal vacation ordinance on the ground that no public purpose was being served, and that the only motive of the council was to benefit an abutting property owner and thereby serve a private pur-

pose. The trial court accepted this contention and held the ordinance void. In reversing the Supreme Court said at page 190:

> "* * * courts have no right to inquire into the motives of a legislative body nor into the wisdom or expediency of legislative acts. The authority of the courts is limited to an investigation of the question whether the legislative acts are beyond the scope of the legislative power. It is presumed that public officials act honestly and patriotically and discharge their duty to the public. Vacation ordinances are seldom passed without some private individual being benefited, and the ordinances are usually passed at the suggestion of some interested person. Because some private interest may be served by the vacation does not render a vacation ordinance void. Before such an ordinance is void it must clearly appear that no consideration of public interest could have led to its enactment. There is abundant evidence in this record which justified the

> finding of the city council that the public interest is served by vacating this alley, and the court is therefore precluded from making further inquiry with respect to the reasons for its passage."

This holding was reaffirmed in another decision by the Supreme Court of Illinois in *The People* v. *C. B. & Q. R. R. Co.*, 314 Ill. 445, where the court repeated the rule at page 448:

> "This court has repeatedly held that courts have no right to inquire into the motives of a legislative body nor into the wisdom or expediency of legislative acts."

The Supreme Court of the United States considered the same question in *Soon Hing* v. *Crowley*, 113 U. S. 703,

710, 711, 28 L. ed. 1145. In this case an ordinance of the City of San Francisco providing for the closing of all public laundries from 10:00 p. m. to 6:00 a. m. was challenged. The claim was made by the petitioner that the principal objective of the ordinance was to discriminate against the members of the Chinese race, and that it was founded upon the hostile motives of the supervisors who passed it. After justifying the ordinance on the basis that it served a public purpose in protecting laborers from uninterrupted labor and applied to all classes the court said:

> "The motives of the legislators, considered as the purposes they had in view, will always be presumed to be, to accomplish that which follows as the natural and reasonable effect of their enactments. Their motives, considered as the moral inducements for their votes, will vary with the different members of the legislative

> body. The diverse character of such motives, and the impossibility of penetrating into the hearts of men and ascertaining the truth, precludes all such inquiries as practicable and futile. And in the present case, even if the motives of the supervisors were as alleged, the ordinance would not be thereby changed from a legitimate police regulation, unless in its enforcement it is made to operate only against the class mentioned; and of this there is no pretense."

The only case cited by Progress in support of its contention is *Gomillion* v. *Lightfoot*, 362 U. S. 916, 5 L. ed. 110. Here again the Supreme Court of Illinois has already spoken. The same facts which Progress offered to prove at the first hearing in this case are now in evidence. The language used by our Supreme Court in distinguishing the *Gomillion* case still applies:

"Progress, however, seems to argue that the facts which they have offered to prove would sufficiently rebut the Park District case. In this contention they rely on the recent case of *Gomillion* v. *Lightfoot*, 362 U. S. 916, 5 L. ed. 2d 110. As we have noted before, the teaching of that case is relevant here, but we think the facts are inapposite. The *Gomillion* case involved a suit for declaratory judgment by several Negroes claiming that Local Act 1940 of the Alabama legislature was invalid on the ground that it deprived them of certain constitutional rights. Act 140 redefined the territorial limits of the city of Tuskegee, converting its shape from square to an 'uncouth twenty-eight sided figure.' All but four or five of approximately 400 qualified Negro voters were thereby excluded from the municipality while none of approximately 600 white voters were removed.

R. 269

The United States Supreme Court, in striking down the redistricting said:

'These allegations, if proven, would abundantly establish that Act 140 was not an ordinary geographic redistricting measure even within familiar abuses of gerrymandering. If these allegations upon a trial remained uncontradicted or unqualified, the conclusion would be irresistible, tantamount for all practical purposes to a mathematical demonstration, that the legislation is solely concerned with segregating white and colored voters by fencing Negro citizens out of town so as to deprive them of their pre-existing municipal vote.

* * * * *

'The complaint amply alleges a claim of racial discrimination. Against this claim the respondents have never suggested, either in their brief or in oral argument, any countervailing municipal function which Act 140 is designed to serve.'

> In the case at bar, the action protested—the condemnation of land for park purposes, is a legitimate and laudable municipal function. The designation of Progress' land as a park site and its acquisition, standing alone, contains no such irresistible mathematical demonstration of illegal purpose as contained in the Alabama legislation.
>
> In *Gomillion*, the United States Supreme Court did not engage in any metaphysical investigation into the motives of the legislators. They found the inescapable illegal purpose from the act itself." (*Deerfield Park Dist.* v. *Progress Development Corp.*, 22 Ill. (2d) 132.)

A case much closer on its facts is *City of Kirkwood* v. *Venable*, 351 Mo. 460, 173 S. W. (2d) 8. Here the City of Kirkwood sought to condemn for park purposes four lots

located within the center of the business district, within 200 feet of the new City Hall. An unoccupied dilapidated house was located on one of the lots and the remaining lots were filled with debris and weeds. The defendant owner contended that the condemnation was not brought in good faith for a public purpose to create the proposed park, but rather to remove this particular property as an eyesore, and that this purpose was not public but private. In refusing to disturb the order of condemnation entered by the trial court the Supreme Court of Missouri said at page 12:

> "While appellant concedes that respondent has the right to condemn for a public purpose and in good faith to acquire lands for a public park, she contends that the proceeding here is a 'mere sham and subterfuge for the purpose of concealing the ulterior motive behind the whole matter.' Appellant says 'the use alleged was public but the proof showed it was private.' The evidence bearing on the issue of good

faith, however, is sufficient to show that the described property was needed for park purposes; that it was suitable for such purposes; and that the respondent city expects and intends to use it for such purposes. Appellant's evidence only tends to show that the motive back of the passage of the ordinance by the city council for the creation of the city park, and the condemnation of appellant's property for that purpose, was to remedy the unsightly, unhealthy and disreputable conditions existing on the said premises. In other words, it appears that the condition of the premises created a demand for a city park on the property and caused the public generally to apply such pressure on the city official to remedy the situation as to force the passage of the ordinance for the creation of a

R. 271

park at the particular location. The evidence is directed to the wisdom, expediency or necessity for the exercise of the right to condemn the property for park purposes. Such evidence is wholly insufficient to establish that the property is being condemned for a private rather than a public purpose."

After the *Kirkwood* case the St. Louis Court of Appeals in *State* v. *Weinstein*, 329 S. W. (2d) 399, was presented with almost the same problem which faced this court in the first hearing of this case. The parallel between the two cases is readily apparent.

The City of Creve Coeur filed its petition for the purpose of condemning certain land for park and playground purposes which included two lots owned by Howard P. Venable and Katie Venable. The Venables had commenced the construction of a house on one of the lots owned by them, pursuant to a building permit obtained from the city, and this residence had been partially com-

pleted at the time of the filing of the condemnation suit. The Venables filed their answer to the petition for condemnation, together with a cross-claim and counter-claim naming as defendants the City of Creve Coeur, the members of the council and certain other individuals.

It was alleged in this cross-complaint and counter-claim that these defendants:

> refused to issue to defendants and their contractor a plumbing permit to which they were entitled under the ordinances of the City of Creve Coeur and applicable regulations of the Metropolitan Sewer District; "hastily chose a site for alleged park condemnation purposes" and "disregarded the unsuitable topog-

> raphy, location and cost of the area sought to be condemned * * *;
>
> "initiated no effort to include the site sought to be condemned for park purposes" within a co-operative program with municipalities located in St. Louis County;
>
> acquiesced on the basis of passion, bias and prejudice in a scheme, device and artifice of a Citizens-Committee whose operation concerned the solicitation and payment of donations to acquire the real estate owned by and surrounding the defendants in order to eliminate occupancy by said defendants;
> Enacted "a condemnation ordinance solely for the purpose * * * of denying to them (the Venables) the exercise of their constitutional rights of residence in the City of Creve Coeur" * * *.

After charging the overt acts summarized above the counter-claim and cross-claim further alleged that the defendants were being deprived of their constitutional rights

and the equal protection of the laws and privileges and immunities of citizens of the United States and the State of Missouri.

The city moved to dismiss the cross-claim and counter-claim on the ground that the allegations simply raised a question of the motive of the legislative body of the City of Creve Coeur in passing the ordinance, and that the trial court had no jurisdiction to inquire into legislative motives where a proper legislative purpose had been established.

In discussing this contention the St. Louis Court of Appeals said at page 406:

"The cases examined by us clearly hold that once

R. 273

> it is established that the use for which private property is appropriated is public, the judicial authority of the court is exhausted. This means that the courts have no authority to pass upon the motives of a legislative body in enacting a statute or an ordinance and are powerless to consider the question of what reasons actuated the legislative body in the passing of the statute or the ordinance, as the case may be."

In reversing the action of the trial court in assuming jurisdiction, and in making its writ of prohibition permanent the court of appeals concluded at page 410:

> "We are aware of the seriousness of the charges contained in the counter-claim and cross-claim filed by the Venables and because of the gravity of the allegations we have conducted an exhaustive research to determine if an exception to the rule, as announced in the *City of Kirkwood* case, was authorized. We found no authority authorizing an exception, and none has been cited to us by respondent. The motive which

actuates and induces the legislative body to enact legislation is wholly the responsibility of that body and courts have no jurisdiction to intervene in that area. *City of Kirkwood* v. *Venable, supra.* "The ordinance passed by the City of Creve Coeur condemns the property for use as a public park and playground. If the land is to be used for this purpose, there is no doubt about it being taken for a public use. However, nothing we have said in this opinion will prevent the Venables from showing as a defense to the condemnation action that the property condemned will not be used as a public park and playground."

With these authorities ranged squarely against it there

would be ample reason to close the door on Progress's attempt to inquire into the motives of the members of the Park Board in filing this suit as contrasted to their purpose. If this were done Progress would have no legal right to complain—it would have received the same treatment as any other defendant in a condemnation suit owning property sought for public purposes. Progress is entitled to no more than equal consideration.

Progress, however, takes the position that nothwithstanding the admitted need for more parks and the suitability of its land for this purpose, nevertheless the filing of this suit represents "purposeful discrimination" against it. It recites the series of events that took place in Deerfield following the release of the news that some of its homes would be sold to Negroes, and says that the *only* reasonable interpretation that can be placed on this evidence is that a conspiracy existed to deprive it of its right to do business in Deerfield.

In making this charge Progress has involved an entire community and the present condemnation suit has been turned to a troublesome problem in race relations. This phase of the case received some comment by Chief Judge Hastings speaking for the court in the appeal taken by Progress in its conspiracy action filed in the United States District Court. (*Progress Development Corporation* v. *Mitchell*, 7th Cir. 1961, 286 Fed. Rep. (2d) 222.) Chief Judge Hastings said at page 234:

> "Since all parties have attempted to inject a racial issue into these proceedings, it seems appropriate to comment on the real issue involved in this litigation.
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> R. 275
>
> The plaintiffs are two corporations organized for profit utilizing only private capital in their operations. No federal agency and no federal funds are involved. For reasons best known to themselves plaintiffs have widely advertised and proclaimed a sales policy based upon a controlled occupancy plan with a quota system they have deemed best suited for the social progress of Deerfield. Some of the citizens of the Village of Deerfield have openly voiced their objections to such a plan and in doing so have exercised their constitutional right of freedom of expression and peaceable assembly. Other citizens of that community have exercised a similar right to express an opposite viewpoint. Plaintiffs have alleged that the conduct of the former group, acting in concert with lawfully constituted Village officials, amounts to an unlawful conspiracy designed to cause such officials to subvert their lawful powers of condemnation and enforcement of local building ordinances to the end that plaintiffs are deprived of their lawful right to engage in business and make a profit. This case is that and nothing more.

> In this case no individual claims to have been denied a personal right. No one claims he has been denied the right to purchase a home. No one claims he has been denied the right to vote, to go to school, to live in a certain place, to eat in a public place, to seek transportation without interference or to work or worship as he chooses. We are concerned with the corporate right to engage in business and make a profit."

The only remaining issue is whether Progress has shown by clear and convincing evidence the existence of a conspiracy to prevent it from doing business in which the participants are guilty of "purposeful discrimination"

R. 276

against it. All the evidence produced by Progress which bears in any way upon this issue has already been summarized in chronological sequence and need not be repeated here.

When this evidence is analyzed it reveals nothing more than that a large number of Deerfield citizens were opposed to the type of integrated subdivision proposed by Progress. The poll taken by the Residents Association clearly revealed this attitude, and at least one member of the Park Board (Keller) openly expressed his opposition to the project.

The evidence also shows that it was during the heat of this controversy that the Park Board submitted to the voters of the Park District the question whether they wished to approve a $550,000 bond issue to provide funds for six (6) new park sites, including Floral Park and Pear Tree.

At this referendum 2635 voters expressed a willingness

to spend this sum for parks. 1207 voters voted against the bond issue. No one can accurately pin point the motives that may have prompted the voters in this referendum. The field of human motivation is one in which psychiatrists and sociologists cannot find agreement. There were undoubtedly some voters who favored parks, and who had no objection to the Progress development; there were undoubtedly other voters who favored parks and did object to the Progress development. It is apparently Progress' contention that there were many voters who were opposed to its development who voted for the referendum for this reason alone. The observation made by Mr. Justice Stone in the *Soon Hing* case *supra*, is equally applicable here:

"The diverse character of such motives, and the impossibility of penetrating into the hearts of men and ascertaining the truth, precludes all such inquiries as impracticable and futile."

Stripped to its essentials, the contention of Progress is that the residents of Deerfield had no legal right to make a choice between the use of Progress' land for park purposes for the benefit of the general public of Deerfield in preference to its use by the defendant for a private residential development. The Supreme Court of Illinois in its prior opinion in this case (*Deerfield Park Dist. v. Development Corp.*, 22 Ill. (2d) 132), has already found this contention to be without any legal merit. At page 140 of this opinion Mr. Justice Solfisburg says:

> "If parks are needed in Deerfield, and if the land so selected for them is appropriate for that purpose, the power of eminent domain cannot be made to depend upon the peculiar social, racial, religious or political

predilections of either the condemning authority or the affected property owner. Progress is entitled to the same opportunity to hold land and operate a business as anyone else. They, like all others, hold their land subject to the lawful exercise of the power of eminent domain."

Some persons may criticize the judgment of the Park Board in holding its referendum at the height of this controversy. The timing of this referendum represented a political decision on the part of the Park Board, subject to review by the voters of the district along with the other acts of the Park Commissioners.

The Park Board had no legal obligation to explain its motives in submitting this referendum to the voters and in

the filing of this condemnation. However, the Park Board offered evidence at the hearing in this case showing that it had already considered both Floral Park and Pear Tree as possible park sites prior to this controversy. The evidence is also undisputed that two earlier referenda had been defeated. If speculation and conjecture are to be indulged in as to the motives of the members of the Park Board one reasonable explanation is that the Park Board considered this controversy as an opportunity to secure this desirable land for needed park purposes on the basis that if action were delayed at this time this land would have been lost for future park development.

The members of the Park Board each testified that—

"I am a commissioner of the Village of Deerfield Park District, and as such commissioner I receive no salary, expense account or cash. I am a commissioner because I believe in the progress of any well organized com-

munity, and the park-school program would benefit the entire village particularly the taxpayers so I serve as a civic duty. My sole and only motive and purpose in voting for the passage of the referendum resolution of December 7, 1959, was to acquire needed park lots for all of Deerfield. I did not have any purpose or motive whatsoever to interfere in any way with the plans of the Progress Development Corporation."

James Mitchell, the president of the Park Board testified—

"I think the Park Board members are not opposed to integration. Through the years on the question of integration the Park Board has been cast in a light that I don't think if particularly enjoyed. I am not

R. 279

opposed to integration. No one asked me that question and I absolutely am not opposed to integration."

The only case cited by Progress on the issue of "purposeful discrimination" is *Snowden* v. *Hughes*, 321 U. S. 1, 64 S. Ct. 397. In this same case the court said:

"But a discriminatory purpose is not presumed, *Tarrance* v. *State of Florida*, 188 U. S. 519, 520, 23 S. Ct. 402, 403, 47 L. Ed. 572; there must be a showing of 'clear and intentional discrimination', *Gundling* v. *City of Chicago*, 177 U. S. 183, 186, 20 S. Ct. 633, 635, 44 L. Ed. 725; see *Ah Sin* v. *Whitman*, 198 U. S. 500, 507, 508, 25 S. Ct. 756, 758, 759, 49 L. Ed. 1142; *Bailey* v. *State of Alabama*, 219 U. S. 219, 231, 31 S. Ct. 145, 147, 55 L. Ed. 191."

If any presumption is to be indulged in the members of the Park Board are entitled to the presumption that public officials are presumed in the performance of their official duties to act honestly and with proper motives.

This rule is well stated in *Tribune Co.* v. *Thompson*, 342 Ill. 503, where a charge of conspiracy was made against certain public officials. The court there said at page 529:

> "There is no direct evidence in this case to prove the conspiracy, and while conspiracy may be proved by undirect or circumstantial evidence such evidence must be clear and convincing, and if the facts and circumstances relied upon are as consistent with innocence as with guilt it is the duty of the court to find that the conspiracy has not been proved. * * * The rule is well established that public officials in the performance of official acts are presumed to act in good faith and

> with honest motives. *Hallett* v. *City of Elgin*, 254 Ill. 343; *Wolbach* v. *Rubens*, 307 id. 186; *People* v. *Chicago, Burlington and Quincy R. R. Co.*, 314 id. 445; 22 Corpus Juris, 135."

Unless suspicion and conjecture are to be substituted for evidence there is no proof in this record of any express or implied agreement on the part of the members of the Park Board with any other persons to institute this condemnation for the sole purpose of forcing Progress out of business.

A reasonable interpretation of the evidence relating to Mitchell and Walchli (the only members of the Park Board who are even charged with any specific misconduct) is that these commissioners were anxious to obtain more land for parks, and were willing to enlist the aid of the members of the Citizens Committee and the Residents Association in securing support for the referendum.

The acquisition by the Park Board of additional land for public use by the citizens of Deerfield was a lawful

purpose. The means adopted to accomplish this object—the referendum and the condemnation—were lawful means. A common undertaking to accomplish a lawful object in a lawful manner is not a conspiracy irrespective of the motives of those engaged therein. (*Boasberg* v. *Walker*, 111 Minn. 445, 127 N. W. 467.)

The United States District Court (*Progress Development Corporation* v. *Mitchell*, 182 F. Supp. 681) and the Circuit Court of Appeals (*Progress Development Corporation* v. *Mitchell*, 286 F. (2d) 222), cosidered this same evidence and found it insufficient to sustain Progress' charges of

R. 281

conspiracy. In the District Court Judge Perry said at page 700:

> "The plaintiffs were given wide latitude in the production of all proofs possible. All sources of possible conspiracy were minutely examined into by plaintiff's counsel. No conspiracy, or any semblance of conspiracy by the Park Board Commissioners was proved. * * *"

Chief Judge Hastings in the Circuit Court of Appeals said at page 299 in affirming the order of the District Court in denying a preliminary injunction to Progress:

> "We have carefully studied the entire voluminous record of the evidence adduced at the lengthy hearings and conclude that on the basis of the testimony and documents before it, the court was fully justified in denying temporary equitable relief under both Counts I and II. The trial court's findings are not only supported by substantial evidence, but our examination of the record fails to reveal to us any evidence of conspiracy. Many statements by individual defendants, which were characterized as extreme

and provocative, appear to have been made in the context of public discussion and in the exercise of an individual's constitutional rights of free speech and peaceable assembly. We do not pass judgment on the propriety and wisdom of such statements relating to the cause and effect of integrated housing."

Progress has already agreed to accept the sum of $166,199.91 as fair compensation for its two properties. It has had its full hearing upon the issues raised by its motion to dismiss. The evidence establishes without question that the taking of this property is necessary and for a public

purpose. The evidence wholly fails to establish the charge of conspiracy against the members of the Park Board. In this situation Progress, as any other citizen, must yield to the paramount right of the Park District to take private land for public use.

Nothing in this decision will affect or impair in any way the admitted right of Progress to carry on its business at any other location where it may be authorized to build homes and at its election to sell a selected number of these homes to members of the Negro race.

Because Progress has failed to establish any defense to this suit its motion to dismiss must be denied.

Petitioner may prepare and, after notice to Progress, present a final order of condemnation. In such order the following findings will be made:

1. That on the date of the filing of this condemnation there was a *bona fide* need for additional land for park purposes in the Deerfield Park District, and such need still exists.

2. That the two properties owned by Progress and sought by petitioner for park purposes, and known as Floral Park and Pear Tree, are needed for park sites, are suitably located and will be used for park purposes.

3. There is no evidence that any member of the Park Board formed or engaged in any conspiracy to deprive Progress of any of its legal rights.

4. The condemnation of Progress' properties is necessary and for a public purpose.

BERNARD M. DECKER,
Judge.